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NO. 826

R. E. TAYLOR, APPELLANT

V.

STATE OF MISSISSIPPI, APPELLEE

APPEAL FROM THE
SUPREME COURT OF MISSISSIPPI

BRIEF FOR THE STATE OF MISSISSIPPI

GREEK L. RICE, ATTORNEY GENERAL
GEO. H. ETHRIDGE, ASSISTANT
ATTORNEY GENERAL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

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SYNOPSIS OF BRIEF FOR THE STATE

I.

Statement of the case.....pages 1 to 10

II.

Indictment, this brief.....pages 1 to 6

III.

Demurrer of the defendants to the Indictment, this brief.....page 6

IV.

Chapter 178, Laws of 1942 (Appendix A), this brief.....pages 6, 10, 11, 12, 16, 18 and Appendix A

This chapter is not an anti-religious measure but a measure in aid of the existing war to safeguard the loyalty and unity of the people of the State .....pages 10 to 16

V.

Opinion of the Supreme Court of Mississippi in Clem Cummings v. State, stating the purpose of Chapter 178, Laws of 1942, delivered by Justice Roberds quoting, this brief.....page

VI.

The charge of Judge Griffith in Clem Cummings v. State, quoted in this brief ..... page 4

VII.

Testimony of Mrs. Houston Bryant, a witness for the State in this case, this brief ..... pages 4 and 5

VIII.

Testimony of Mrs. T. K. Joyner, a State witness, quoted from, this brief ..... page 8

IX.

Testimony of Mrs. W. B. Denson, witness for the State, this brief ..... pages 8, 9 and 10

X.

Motion of the defendants in the trial court for a directed verdict, this brief ..... page 9

XI.

R. E. Taylor, pro se, this brief ..... pages 9 and 10

XII.

Chapter 155, Laws of 1942 (Appendix B) requires students in all state supported schools to Pledge Allegiance to the Flag, this brief ..... page 11 and Appendix B

XIII.

XIV.

XV.

XVI.

XVII.

Every right, constitutional or otherwise, is given as guaranty, subject to reasonable regulation by the legislative authority to secure the safety, health, peace and general welfare. In other words, such rights are not absolute. In every organized government public rights are to receive due consideration and individual rights are granted and secured in view of the duty of the government to protect the whole people in all reasonable ways, this brief .....pages 32 et seq.

XVIII.

In construing the statute and granting the government power conditions existing in the State which brought forth the legislation must be considered, this brief.....pages 42 and 43

XIX.

In answer to the contention of the appellant that the statute is void because Congress has taken over the field of control as to the use of the flag is unsound. The State has power to legislate upon the subject as well as the National Government and in construing the statute it must be construed so as to permit both the State and Federal law to operate unless there is a clear and

TABLE OF STATUTES

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BRIEF FOR THE STATE OF MISSISSIPPI BY GREEK L. RICE, ATTORNEY GENERAL, AND GEO. H. ETHRIDGE, ASSISTANT ATTORNEY GENERAL.

The appellant, R. E. Taylor, was indicted in the circuit court of Madison County, Mississippi, at the June term thereof, the indictment appearing at pages 5 to 7 of the record. The appellant was jointly indicted with his wife, Mrs. R. E. Taylor, who was not tried at the June term, 1942. It is charged in the indictment that R. E. Taylor on the 29th day of June, 1942, in the county aforesaid, did then and there wilfully, intentionally, unlawfully, and feloniously teach and disseminate teachings orally in that he said to Mrs. T. K. Joyner, Mrs. W. B. Denson, Mrs. Huston Bryant, and other persons whose names are unknown to the Grand Jury, "It is wrong for the President to send the army across for they are just being shot down for nothing. Hitler will rule, he will not come

over here to do it. He won't have to. If we would quit kneeling and worshipping our flag, peace would come to us, and study and learn this literature and worship in the right way, peace would come to earth, but as long as we go around worshipping our flag and government, we will never have peace, for we just worship our flag and government for our religion." (R. p. 5) The indictment alleges that "they said to Mrs. T. K. Joyner and Mrs. W. B. Denson that their boys might have thought they were doing right, but that it is wrong to fight our enemies, and other words and teachings, all said teachings and words were designed, and calculated to encourage disloyalty to the government of the United States of America and the State of Mississippi and reasonably tending to create an attitude of stubborn refusal to salute, to honor and respect the flag and government of the United States of America and the State of Mississippi; and did then and there wilfully, intentionally, unlawfully, and feloniously distribute literature and printed matter in that they did hand out and distribute to Mrs. T. K. Joyner, Mrs. Huston Bryant, Mrs. W. B. Denson, and other persons whose names are unknown to the Grand Jury at this time, books and pamphlets entitled GOD AND THE STATE which contains the statement 'Non-Christians may salute the flag without reference to the foregoing rules. Those who are real conscientious Christians are in a class entirely different from others of the world, Jehovah's Witnesses are Christians and in a covenant to be entirely obedient to God's law. They must teach their children and admonish them to obey God's law, as he commanded. They are conscientious and they sincerely believe that for them to indulge in the formalism or ceremony of saluting any flag is a violation of God's specific commandment.' " (R. p. 6)

The indictment also alleges other paragraphs and statements of disloyalty to the United States of America, and alleges that books and pamphlets entitled REFUGEES contain the statements, "All nations of the earth today are under the influence and control of the demons. All the nations suffer the same fate or come to the same end, because all nations of the earth are on the wrong side, that is on the losing side. All of such nations are against the Theocratic Government, that is, the government or kingdom of the Almighty God . . . All are under the control of the invisible host of demons." (R. p. 6) The indictment further alleges that books and pamphlets entitled LOYALTY contain the statement, (R. p. 7) "For the Christians to salute a flag is in direct violation of God's specific commandment," and contain other paragraphs and statements of disloyalty to the United States of America.

The indictment alleges that they also distributed books and pamphlets entitled END OF THE AXIS POWERS, COMFORT ALL THAT MOURN, which contains the statement, "Almighty God commands that they must remain entirely neutral in the controversy. Because his covenant people are servants and representatives of the Theocracy they must hold themselves entirely aloof from warring factions of this world." (R. p. 7)

The indictment alleges that "the said pamphlets and books were published by Watchtower Bible and Tract Society, Inc., International Bible Students Association, and were designed and calculated to encourage disloyalty to the Government of the United States of America and the State of Mississippi and reasonably tending to create an attitude of stubborn refusal to salute, honor, and respect the flag and government of the United States of America and the State of Mis-

sissippi contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Mississippi." (R. p. 7)

The defendant in the trial court filed motion to quash, (R. 10) in which motion certain grounds were given as reason therefor, which motion is directed to the constitutionality of the act of the legislature, known as H. B. 689 of the regular session of 1942, which is Chapter 178 of the Laws of 1942. (Appendix A) The motion to quash has the substance but not the form of a demurrer, and under our statute objections appearing on the face of an indictment must be taken by demurrer not otherwise. However, the defendant demurred to the indictment, setting up the same grounds in the substance as the motion to quash which demurrer appears at pages 13-15 and 18 of the record. Both the motion to quash and the demurrer were overruled and the case proceeded to trial. (R. 13-16)

Two main questions as to the constitutionality of Chapter 178, Laws of 1942, (Appendix A) arise on the record: First. Is the statute constitutional on its face, that is, can it be upheld as to any of its features or to any of the things made criminal thereby; and, Second. Is it constitutional as applied to the evidence in the record? The other questions raised may also be considered. **The statute is a war measure and a state of war actually existed at the time it was enacted. Many things may be prohibited in time of war that would be permissible in time of peace. Every person in the United States has had his ordinary peace time liberties abridged, or suspended. We have to give up rights in time of war that are considered fundamental liberties in time of peace.** It is not necessary to enumerate them for we daily confront them in rationing of many of the necessities of life and even more so in

the conveniences of life, to say nothing of luxuries. The statute under review does not command affrmative acts. It prohibits a number of things deemed dangerous to the unity, the loyalty and the peace and safety of the state of Mississippi and of the United States. There is much force in what Justice Roberds says in the main opinion in Clem Cummings v. State, 11 So. (2nd) 683 as follows:

> "The Mississippi statute does not attempt to coerce, control or direct, in the slightest degree, the conscience or religious beliefs of any person. So far as that statute is concerned, one may believe in and worship a Divine Being, or any ideal or thing the worshipper may think divine, under the name of Jehovah, or any other name; or, on the other hand, he is free to worship Satan, a golden calf, any animal or thing, or any image of anything, real or imaginary. What the statute does prohibit is the going about into the homes and among the people, and, by affirmative teaching and action, attempting to persuade the people, at this tragic time, to have disrespect for and disloyalty towards the flag and the state and the nation, and to evince an attitude of disobedience to the laws of the land, thereby undermining the war efforts of the state and national governments. The statute does not command any one to salute the flag or do anything else; it simply demands that people shall not engage in certain affirmative activities which the sovereign state, through its legislature, has determined are harmful to other people and to the public welfare and to the defensive war efforts of the state and nation."

The majority opinion delivered also by Justice Rob-

erds in the instant case is a complete answer, in my opinion, to the challenge to the constitutionality of Chapter 178, Laws of 1942. (Appendix A). Further argument will be made, with citation of authorities deemed proper, later in this brief, but I desire also to quote in full the concurring opinion of Justice Griffith in the Cummings case, as follows:

> "Teaching that to salute the National flag is an act of idolatry, and that the consequences of such an act is eternal damnation, is a pointed symptom of the disease which lies at the bottom of the subversive and destructive doctrines which this appellant and his co-workers are seeking to spread in our state in this time of war, the result of which means everything to us as a state and nation. We must look behind technical obscurities and to the substance of things. If appellant may maintain the right so to teach it and urge it among the soldiers and marines wherever access may be had to them; and if our soldiers were to refuse to salute the flag wherever unfurled, and particularly when the military regulations require them to do so, then we would have an army and a navy which would be entitled to no respect at home or abroad; and whoever teaches that which, if followed, would bring our armed forces into such disrespect ought well to be in the penitentiary, as the statute appropriately declares." 11 So. (2nd) 684.

The evidence on behalf of the state supported the allegations of the indictment. The ladies mentioned above testified to the statements contained in the indictment. The testimony of Mrs. Houston Bryant begins at Page 45 of the record and extends to page 68. On page 47, this witness says:

"Well, the first time he came to our home he had those books, and he said he was not selling books for a living; said he was selling those—distributing those books for the people to live by, and to teach their children by."

On Page 47, she said further:

"Well, he said it was wrong for our President to send those boys across in uniform to fight our enemies; said it was wrong to fight our enemies; said they were being shot down for no purpose at all; said Hitler would rule, but he wouldn't have to come here to rule; and he said the quicker people here quit bowing down and worshipping and saluting our Flag and Government, the sooner we would have peace. He said it was wrong to fight our enemies; that we were being shot down for no purpose at all."

In answer to a question by the District Attorney, she said, "Yes, sir; he said he may have thought he was doing the right thing by going over there and fighting for his country," referring to the son of the witness.

"Q. But what did he say about whether it was right or wrong?"
"A. He said it was wrong."

The books and pamphlets distributed by the defendant to the witnesses were identified and introduced by the District Attorney. (R. 48-52 & 91). The contents of the said books, as alleged in the indictment, were introduced into the record and not the whole of the said pamphlets or books, but later the entire substance of the books seems to have developed in cross-examination and the books were introduced as evidence.

Mrs. T. K. Joyner was introduced as a witness by the state. (R. pp. 69-82) Pamphlets and statements by the defendant, as given by this witness, are substantially the same statements as made to the first witness, Mrs. Houston Bryant, and the pamphlets are identical. I deem it unnecessary to set out by quotation the testimony of this witness. The court will, of course, read the record and see that there is substantially no conflict in the evidence of the three witnesses. Mrs. W. B. Denson was the third witness introduced by the state. (R. 83-91) I quote, in part, as follows:

"Q. Did they talk in that tone and about that speed?"

"A. So, they said this country was clamoring for dictatorship, and it was wrong for the President to put uniforms on our boys and send them to fight the enemies; and they said the sooner we quit bowing down to the Flag—to the government and her Flag, that much sooner would we have peace; that we couldn't have peace as long as we believed in saluting the flag. And he said that Hitler would rule; he said that he wouldn't come here, he wouldn't have to, but he would rule; and he said there were just as many sheep—he divided the people as sheep and goats, the Jehovah's Witnesses were the sheep and the believers; and he said there were just as many sheep in Germany as there were here. And just at this time, Mrs. Taylor spoke up and said, 'You know you would hate to see a German mother lose her son as much as you would anyone else.' But he told me to study the literature and that I would get comfort from it."

Some of these state witnesses had sons who had lost their lives in public service, and it was conversely shown in the evidence that the sons would come back and live on earth, which statement was made seemingly to comfort the mothers who had lost their sons in the present war.

With the testimony of these three witnesses, the state rested; whereupon the attorney for the appellant filed a motion for a directed verdict, which appears on pages 92 to 94 of the record, which motion was overruled. Whereupon the defendant introduced a witness, Mrs. G. C. Clarke, who atterded the preliminary trial and was introduced to show that the testimony of the state witnesses were at variance on the present trial from that of the preliminary trial. She testified that she was present at the preliminary trial and heard the state witnesses testify, but that she had not heard them testify on the present trial. She testified that on the preliminary trial they testified that the defendant said to the witnesses for the state that their sons would be resurrected; that she could not repeat the identical words, but she could the substance of it; and that she was positive they said Hitler would win the war.

"Q. Isn't it a fact that they said Hitler would rule?"

"A. No, he said Hitler would win the war." R. 103.

She was not a Jehovah Witness, she testified, but she had been a teacher and she did not teach the literature involved.

R. E. Taylor, the defendant, testified. His testimony begins at Page 104 of the record and extends to Page 135. He testified that he was an ordained minister of the Jehovah Witnesses, but that he did not believe

and did not teach that it was wrong for any person to salute the flag who was not under a covenant with Jehovah, and testified he did not say that Hitler would win. He testified in answer to a question, "Did you tell her Roosevelt was doing wrong by putting uniforms on the boys?" He said, "I will answer that by saying that has not taken place at any time, that has not happened yet, to send them off to be shot down." The jury accepted the State's evidence as being the facts.

As I understand, the appellant in this case, as in the other cases, is relying largely, if not entirely, upon the unconstitutionality of Chapter 178 of the Laws of 1942, (Appendix A) and this brief will be addressed largely to that question.

Chapter 178 of the Laws of 1942 is a war statute and is for the protection of the state and nation from disloyal activities by persons with the intent to obstruct the war activities of the state and nation. It is in no sense an anti-religious act and is not intended to interfere with proper religious liberty as recognized and enforced in the courts of this nation and the states. The act expressly declares that it will terminate at the end of the present war.

The act is prefaced with statements of the reason for its enactment which clearly show that it was enacted as a police measure in aid of the Federal Government in waging the present war, and which only applies to persons whose religious views conflict with the law of the land as interpreted by the highest courts of the land. There must be a dividing line between governmental authority and the liberties of the citizens and that line must be determined in the light of the history of the origin of the government and since the United States became a government with a

written constitution limiting the power of the government and defining the liberties of the citizens.

In connection with Chapter 178, the legislature at its 1942 (Appendix A) session also enacted Chapter 155 of the Laws of 1942, (Appendix B) requiring students in all public schools of the state to take the pledge of allegiance to the flag, and to the Republic for which it stands, the statute giving the pledge in its most usual form in this country. However, the state from 1916 to the present time had (and still has) a statute protecting the flag from insult and dishonor, enacted in 1916, prior to our entry into the World War. This statute is Section 930 of the Code of 1930 and was originally Chapter 118, Laws of 1916. It is a rather long statute and designed to preserve the flag from desecration and to preserve and protect the loyalty of the citizens of the state to the flag, both of the state and the United States. It is made a crime to desecrate the flag in the manner provided for in the statute, which part reads:

> "Or who shall publicly mutilate, deface, defile or defy, trample upon or cast contempt, either by word or act, upon any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment for not more than thirty days, or both, in the discretion of the court; and shall also forfeit a penalty, in the discretion of the court, of not more than fifty dollars for each such offense, to be recovered with costs in a civil action or suit, in any court having jurisdiction, and such action or suit may be brought by and in the name of any citizen of this state, and such penalty when collected, less the reasonable cost and expense of action or suit, shall be paid into the treas-

ury of this state; and two or more penalties may be sued for and recovered in the same action or suit."

The legislature also in the Code of 1930, by Section 6544 of the Code, originally required the flag to be displayed either inside or outside of each public school and for the teaching of patriotism. This act was amended by Chapter 59, Laws of 1935, which provides that the flag of the United States shall be displayed at each school building of the state in close proximity to the school building, during all times the weather will permit without damage to the flag, and the trustees of every school shall provide for the flag and its display. Section 2 of this act provides that every school within the state shall arrange a course of study concerning the flag of the United States, which course of study shall include a history of the flag, what it represents, and proper respect therefor

By section 6630 of the Code, Paragraph 13 of said section, it is made the duty of the trustees of each school to provide for the observance of respect for the flag and the teaching of patriotism, etc. These statutes harmonize the Federal Law and regulations on saluting and honoring the flag. See Chapter 435, 56 Statutes 378; U.S.C.A. Title 36, 176 and 177. (Appendix D) (note the statutes mentioned, but not quoted or made an appendix, are cited merely to show intent on the part of the Legislature).

The indictment in this case is made under Section 1, Chapter 178, Laws of 1942, which reads:

"Section 1. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI, That any person who individually, or as a member of any organization, association, or otherwise, shall intentionally, preach, teach, or disseminate any teach-

ings, creed, theory, or set of alleged principles, orally, or by means of a phonograph, or other contrivance of any kind, or nature, . . . or by the distribution of any sort of literature, or written or printed matter, **designed** and **calculated** to encourage violence, sabotage, or disloyalty to the government of the United States, or the state of Mississippi, . . . or which would incite racial distrust, disorder, prejudices or hatreds, or which reasonably tends to create an attitude of stubborn refusal to salute, honor or respect the flag or government of the United States, or of the State of Mississippi, shall be guilty of a felony and punished by imprisonment in the state penitentiary until treaty of peace be declared by the United States, but such imprisonment shall not exceed ten years."

This statute is only one of a number of statutes enacted in 1942 as war measures after war had actually been declared by this government upon Japan, Germany, and Italy. These statutes should be considered in connection with Chapter 178, as showing the purpose to preserve peace, order, safety, provide for common defense and general welfare of the state. The following statutes are merely to show that the Legislature was dealing with a war situation. These companion statutes are:

Chapter 175 of the Laws of 1942 provides rules and regulations of blackouts and enforcements thereof, and imposes severe penalties for violating such law.

Chapter 194, Laws of 1942, is an act authorizing the boards of supervisors in the state to expend funds in connection with any national defense effort or project, and is limited to the duration of the war.

Chapter 177 of the Laws of 1942 is an act entitled:

"AN ACT TO PROVIDE FOR THE COMMON DEFENSE, THE REGISTRATION OF ALL GUNS, RIFLES, PISTOLS, AND OTHER WEAPONS, OR ARMS, CAPABLE OF BEING USED IN DEFENSE: TO PROVIDE FOR THE REPELLING OF INVASIONS, SUPPRESSING INSURRECTION, REBELLION OR RIOT."

This is, of course, a war measure, and intended to furnish the peace officers with the information as to where weapons needed for the preservation of peace and safety, and law and order, may be found.

Chapter 183, Laws of 1942, is an act to prevent intentional injury to and interference with property used in connection with war preparation or communitions.

Chapter 196 of the Laws of 1942 is an act to authorize the Board of Supervisors wherein an army camp or cantonment is located, either wholly or partially, to employ deputy sheriffs in accord with the discretion of the board and fix salaries therefor. This is a police measure for the protection of the army from disturbers and to protect the public in the enjoyment of peace and quiet. It is a police measure, in time of war, for the public safety.

Chapter 323 of the Laws of 1942 is an act making it unlawful to use force or violence or threats thereof or attempt to prevent any person from engaging in any lawful vocation and providing penalties for the violation thereof; making it unlawful for any person acting in concert with other persons to assemble and prevent or attempt to prevent by force or violence any person from engaging in any lawful vocation and making it unlawful to encourage and aid such unlawful assemblage and providing penalties therefor. This statute is one to guarantee the right to work and

follow lawful vocations of all citizens against organized disturbances and was enacted in furtherance of the national policy of giving to all citizens the right to engage in public works carried on to promote the war efforts of the government. This statute protects negroes and non-union men in securing work.

Chapter 176 of the Laws of 1942 is an act to create protection and safety units, or guard units, for such areas or tracts of land on which are located our munition plants, ship building plants or where munitions or other war materials are being manufactured or ships being built, to prevent sabotage; to provide for the organization of said units; and to define the duties and powers of the same. This is a law protecting by the forces of the state, and rendering aid to the national government in preventing sabotage, injury or destruction to the plants used in the manufacture of war material.

Chapter 186 of the Laws of 1942 creates the defense council, defines their duties, and is designed to take care of the emergency of the war period.

Chapter 102 of the Laws of 1942 is an act appropriating additional moneys to the regular appropriations made in Chapter 84 of the Laws of 1942, to carry out measures deemed necessary for the duration of the war, which act appropriates Five Hundred Thousand Dollars, an amount largely in excess of the usual appropriation.

These companion statutes are cited merely to show the legislature was enacting war measures.

When all of these acts are considered together, it would seem clear, I think, that the legislature was using its foresight to provide for the common defense in time of possible disturbance or violence during the period of the war, and to promote the peace, safety, and welfare of the state during the war, when many

of the male citizens of the state of military age will be called away from home and in the national service. In war time the police powers of the state are enlarged by the necessity growing out of conditions that do arise during the war when the ordinary methods would not be either available or effective.

Chapter 178 of the Laws of 1942 is in no sense an act on the part of the legislature to prevent the proper exercise of religious liberty, and was not aimed at Jehovah's Witnesses. In fact, one of the most drastic bills introduced, of which the present law is a modified form, eliminating many of the drastic features of the original bill, was directed specifically at communism, the Communist party, and the International Communistic organization. Inasmuch as Russia was at war against our enemies, and the activities of Communism had been largely attributed to Russian influences prior to the war, it was thought best to eliminate Communism by name or to the organizations specifically mentioned, and to limit as the present law does, to such acts as would be injurious to the unity and safety of the state and especially of the state and national government in providing against conditions that might easily arise in the state. The legislature had the right to provide for possible contingencies as well as actual existing circumstances. No one can foresee what may happen during the course of the war nor foresee to what desperate extent our efforts may be put to preserve our government and our democratic system of constitutional liberty, founded by the consent of the people and exercised by their representatives. The court knows and the legislature knew that this state has two races of approximately equal numbers. If it should develop that some of our enemies, especially the Japanese should gain a foothold along the shores of the Gulf or Mexico or in ac-

cessible distance to the oil fields of the northeast of Mexico, and in Texas, Louisiana, Oklahoma, and other states, including our own, their efforts would be, very probably, to destroy these oil fields and to incite the colored race to violence and disturbance. It is not pleasant to mention these things, and I am one of those who believe that larger privileges of education and opportunity should be given the negro race. The leaders and best educated of the negroes, as a rule, do not expect or desire social equality, and the white race in the South are against it; but there are possibilities of disturbances growing out of friction in race pride, race prejudices, etc., between the two races. If we should have the war brought to our own shores, it would be natural for our enemies to try to stir up these prejudices and differences and to make a portion of them disloyal to their government. This has been notoriously practiced by the Japanese and other countries of the world, and no doubt there have been many spies traveling through this country, composed as it is of different nationalities and different races, to stir up disloyalty and friction, to weaken our military forces, in efficacy.

The police power of the state extends to all the great public needs as said by the United States Supreme Court in the case of Noble State Bank v. Haskell, 219 U. S. 104, 55 L. Ed. 112. See especially the second syllabus: Police power of the state may be used in aid of the national defense as well as the preservation of peace and order within the state limits. The state is a part of the nation and what affects the nation affects the state. The people of the state are a part of the nation and disorder, violence or rebellion in the state may require a part of the national force in the state to maintain order and put down violence

or rebellion when it might be urgently needed elsewhere.

Consequently, Chapter 178, Laws of 1942, (Appendix A) may be justified purely as a police measure. In the case of Gilbert vs. State of Minnesota, 254 U. S. 325, 65 L. Ed. 287, it was held that congressional power is not encroached upon by the enactment by a state of an act making it unlawful to teach that men should not enlist in the military forces of the United States, or that citizens of the state should not aid or assist the United States in the prosecution or carrying on of the war on public enemies of the United States. Such act renders a service to the United States and may even be used to preserve the peace of the state. At page 289 of the L. Ed. (254 U. S. at p. 330) of this case, it is said:

> "And so with the statute of Minnesota. An army is an instrument of government, a necessity of its power and honor and it may be, of its security. An army, of course, can only be raised and directed by Congress; it neither has the state power, but it has power to regulate the conduct of its citizens, and to restrain the exertion of baleful influences against the promptings of patriotic duty, to the detriment of the welfare of the nation and state. To do so is not to usurp a national power, it is only to render a service to its people, as Nebraska rendered a service to its people when it inhibited the debasement of the flag. . . . The statute, indeed, may be supported as a simple exertion of the police power to preserve the peace of the state. As counsel for the state say: 'The act under consideration does not relate to the raising of armies for the national defense, nor to rules and regulations for the government of those under arms. It is simply a local police measure, aimed to suppress a species of sedi-

tious speech which the legislature of the state has found objectionable. If the legislature has otherwise power to prohibit utterances of the character of those here complained of, the fact that such suppression has some contributory effect on the Federal function of raising armies is quite beside the question." And the state knew the conditions which existed and could have a solicitude for the public peace, and this record justifies it."

See this case in 142 Minn. 485, 171 N. W. 789, showing the character of prohibition involved in that case which is comparable to the language of Section 1 of the present statute. See also Gitlow vs. New York, 268 U. S. 652, 69 L. Ed. 1138, in which case a law of the state of New York prohibits the advocacy for the purpose of bringing about the destruction of organized parliamentary government, of mass industrial revolts usurping the functions of municipal government, political mass strikes directed against the parliamentary state and revolutionary mass action for its final destruction, necessarily implies the use of force and violence, and in its essential nature is inherently unlawful in a constitutional government of law and order.

In the third syllabus of this case it is said: "The freedom of speech and of the press, which is secured by the Constitution, does not confer the absolute right to speak or publish without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom."

In the fourth syllabus, it is said:

"A state may punish those who abuse the constitutional freedom of speech by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace."

In the fifth syllabus, it is said:

"A state may punish utterances endangering the foundations of organized government, and threatening its overthrow by unlawful means."

In the sixth syllabus, it is said:

"Every presumption must be indulged in favor of the validity of a statute."

In the seventh syllabus, it is said:

"The state is primarily the judge of regulations required in the interest of public safety and welfare, and its police statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the state in the public interest."

In the eighth syllabus, it is said:

"That utterances inciting to the overthrow of government bear no casual relation to any substantive evil consummated, attempted, or likely, does not render unconstitutional, as applied to them, a statute making penal utterances inciting to such overthrow by unlawful means.

In the course of the opinion at Page 1145 of the Law Edition Report, 286 U. S. 666, it is said:

"For present purposes we may and do assume that freedom of speech and of the press—which are protected by the 1st Amendment from abridgement by Congress—are among the fundamental personal

rights and 'liberties' protected by the due process clause of the 14th Amendment from impairment by the states. We do not regard the incidental statement in Prudential Ins. Co. v. Cheek, 259 U. S. 530, 543, 66 L. Ed. 1044, 1053, 27 A. L. R. 27, 52 Sup. Ct. Rep. 516, that the 14th Amendment imposes no restrictions on the states concerning freedom of speech, as determinative of this question. It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. (Cites many authorities). Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the Republic. That a state in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. (Cites many authorities.) Thus it was held by this court in the Fox Case, that a state may punish publications advocating and encouraging a breach of its criminal laws; and, in the Gilbert Case, that a state may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with public enemies. And, for yet more imperative reasons, a state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own

existence as a constitutional state. Freedom of speech and press, said Story (supra), does not protect disturbances of the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government, or to impede or hinder it in the performance of its governmental duties. . . . By enacting the present statute the state has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence, and unlawful means, are so inimical to the general welfare, and involve such danger of substantive evil, that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. (Citing authorities). And the case is to be considered 'in the light of the principle that the state is primarily the judge of regulations required in the interest of public safety and welfare,' and that its police 'statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise interest.' "

In the case of Whitney v. California, 274 U. S. 357, 49 S. Ct. 751, 71 L. Ed. 1095, the Supreme Court of the United States, the final judge on the limitation of the power of the state, dealt with the question. In this case Anita Whitney was indicted and convicted in the California court for violation of the statute of that state, and it was held by the Supreme Court:

"A statute providing for punishment of criminal syndicalism does not violate the equal protection clause of the Constitution because its penalties are confined to those who advocate a resort to violent

and unlawful methods as a means of changing industrial and political conditions, without including those who advocate to such methods as a means of maintaining such conditions."

It also held that:

"The protection clause of the Federal Constitution does not take from a state the power to classify in the adoption of police laws, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary."

It also held that:

"One assailing a legislative classification as unconstitutional has the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

"A state may properly direct its legislation against what it deems an existing evil without covering the whole field of possible abuses.

"The freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity to every possible use of language and preventing the punishment of those who abuse their freedom."

It was held that:

"The constitutional right of freedom of speech and of assembly and association is not infringed by a statute providing punishment for one who knowingly becomes a member of, or assists in organizing, an association to advocate, teach or aid and abet the commission of crime or unlawful acts of force, vio-

lence, or terrorism as a means of accomplishing industrial or political changes.

"Every presumption is to be indulged in favor of the validity of a statute."

Without quoting from the opinion at any length, I submit to the Court that this case and others cited cover the present case.

I also desire the Court to consider the questions involved in the Gitlow vs. New York case, 234 N. Y. 132, and the statutes there considered, compared to the present statute. When these principles are borne in mind, it seems to me that the constitutionality of the present statute, as a war measure, is completely covered and upheld. I have personally favored the constitutional protection guaranteed to each citizen as fully as anyone else. They safeguard the bills of rights which are dear to me, but they do not warrant anyone destroying the peace and order of the state, or endangering the national safety, when such is brought within the purposes for which the guarantee is made. The liberties secured therein may be reasonably regulated.

As to the definiteness of the statute, I think that is sustained overwhelmingly by the authorities and merely refer the court on that proposition to the notes in 73 A. L. R. 1494, 20 A. L. R. 1355, and 1st A. L. R. 336, and these notes also show the authority which the state has in dealing with propaganda and newspaper comments and public or private speech deemed inimical to the public welfare. I especially wish the Court to take the syllabus in Ed Sproles et al v. T. Benson, Sheriff, 286 U. S. 374 52 S. Ct., 581 76 Law Edition 1167. In the third syllabus, it is stated:

"To make scientific precision a criterion of the con-

stitutional power would be to subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the 14th Amendment was intended to secure."

In the fourth syllabus:

"When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range or discretion cannot be set aside because compliance is burdensome."

In the eleventh syllabus:

"The requirement of reasonable certainty in statutes does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding."

I desire to call the Court's attention now to cases which I regard as fully establishing the validity of the present statute as against the grounds of freedom of speech, freedom of religion and freedom of public assemblage. See the cases of Minersville School District et al, v. Walter Gobitis, et al, 310 U. S. 586, 607, 84 L. Ed. 1375; George Reynolds v. U. S. 98 U. S. 145, 25 L. Ed. 244; McIntosh v. United States, 283, U. S. 605, 75 L. Ed. 1302; Schneck v. United States, 249 U. S. 47, 63 L. Ed. 470, 39 S. C. 247; Schwimner vs. United States, 279 U. S. 644, 49 S. Ct. 644; 73 L. Ed. 889 Hamilton vs. Regents, et al, 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343; Nichols vs. School Board, 110 A. L. R. 377. 7 N. E. (2d) (Mass.) 577.

I desire to take up the case of McIntosh v. United States, 75 L. Ed. 1302, 283 U. S. 605, 635. This was a

case where a Dr. McIntosh, a distinguished educator, had sought to be naturalized as a citizen of the United States but refused to take the oath to defend the United States in case of war unless he approved the justness of the war. Naturalization laws and rules required that the applicant for naturalization should, before he is admitted to citizenship, pledge on oath in open court that he will support the Constitution of the United States and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state or sovereignty of which he was before a citizen or subject, and he will support and defend the Constitution and laws of the United States against all enemies, foreign or domestic, and bear true faith and allegiance to the same, and other requirements set out in the opinion. It is also required that the court be satisfied that the applicant securing his residence in the United States has behaved as a man of good moral character, attached to the principles of the Constitution of the United States. The court at page 1306 of 75 L. Ed. p. 616 of 283 U. S. said:

"But the proof of good behavior does not close the inquiry. When does the statute require examination of the applicant and witnesses in open court and under oath, and for what purpose is the government authorized to cross-examine concerning any matter touching or in any way affecting the right of naturalization? Clearly, it would seem, in order that the court and the government, whose power and duty in that respect these provisions take for granted, may discover whether the applicant is fitted for citizenship; and to that end, by actual inquiry, ascertain, among other things, whether he has intelligence and good character;

whether his oath to support and defend the Constitution and laws of the United States, and to bear true faith and allegiance to the same, will be taken without mental reservation or purpose inconsistent therewith; whether his views are compatible with the obligations and duties of American citizenship; whether he will upon his own part observe the laws of the land; whether he is willing to support the government in time of war, as well as in time of peace, and to assist in the defense of the country, not to the extent or in the manner that he may choose, but to such extent and in such manner as he lawfully may be required to do. These, at least, are matters which are of the essence of the statutory requirements, and in respect of which the mind and conscience of the applicant may be pertinent inquiries, as fully as the court, in the exercise of a sound discretion, may conclude it is necessary."

On page 1307 L. Ed. (617 Official Edition) the Court said:

"Upon the preliminary form for petition for naturalization, the following questions, among others, appear:

'20. Have you read the following oath of allegiance? (which is then quoted).
Are you willing to take this oath in becoming a citizen?'

'22. If necessary, are you willing to take up arms in defense of this country?'

In response to the questions designated 20, he answered, 'Yes'. In response to the question designated 22, he answered 'Yes, but I should want to

be free to judge of the necessity.' But in a written memorandum subsequently filed, he amplified these answers as follows: '20 and 22. I am willing to do what I judge to be in the best interests of my country, but only insofar as I can believe that this is not going to be against the best interests of humanity in the long run. I do not undertake to support "my country, right or wrong" in any dispute which may rise, and I am not willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not "take up arms in defense of this country," however "necessary" the war may seem to be to the government of the day.

" 'It is only in a sense consistent with these statements that I am willing to "support and defend" the government of the United States against all enemies, foreign and domestic. But just because I am not certain that the language of questions 20 and 22 will bear the construction I should have to put upon it in order to be able to answer them in the affirmative, I have to say that I do not know that I can say "Yes" in answer to these two questions.' "

"Upon hearing before the district court on the petition, he explained his position more in detail. He said that he was not a pacifist; that if allowed to interpret the oath for himself he would interpret it as not inconsistent with his position and would take it. He then proceeded to say that he would answer Question 22 in the affirmative only on the understanding that the war was morally justified before he would take up arms in it or give it his moral support. He was ready to give to the United States all the allegiance he ever had given or ever could give to any country, but he could not put allegiance to the government of any country before allegiance

to the will of God. He did not anticipate engaging in any propaganda against the prosecution of a war which the government had already declared and which it considered to be justified; but he preferred not to make any absolute promise at the time of the hearing, because of his ignorance of all the circumstances which might affect his judgment with reference to such a war. He did not question that the government under certain conditions could regulate and restrain the conduct of the individual citizen, even to the extent of imprisonment. He recognized the principle of the submission of the individual citizen to the opinion of the majority in a democratic country; but he did not believe in having his own moral problems solved for him by the majority. The position thus taken was the only one he could take consistently with his moral principles and with what he understood to be the moral principles of Christianity. He recognized, in short, the right of the government to restrain the freedom of the individual for the good of the social whole; but was convinced, on the other hand, that the individual citizen should have the right respectfully to withhold from the government military services (involving as they probably would, the taking of human life) when his best moral judgment would compel him to do so. He was willing to support his country, even to the extent of bearing arms, if asked to do so by the government, in any war which he could regard as morally justified."

The court further said on Page 1309 of the Law Edition (621 Official Ed.):

"There are few finer or more exalted sentiments than those which find expression in opposition to war. Peace is a sweet and holy thing, and war is a

hateful and abominable thing to be avoided by any sacrifice that a free people can make. But thus far mankind has been unable to devise any method of indefinitely prolonging the one or entirely abolishing the other; and, unfortunately, there is nothing which seems to afford positive ground for thinking that the near future will witness the beginning of the reign of perpetual peace for which good men and women everywhere never cease to pray. The Constitution, therefore, wisely contemplating the ever present possibility of war, declares that one of its purposes is to 'provide for the common defense.' In express terms Congress is empowered 'to declare war' which necessarily connotes the plenary power to wage war with all the force necessary to make it effective; and 'to raise * * * armies,' which necessarily connotes the like power to say who shall serve in them and in what way.

"From its very nature the war power, when necessity calls for its exercise, tolerates no qualifications or limitations unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams, 'This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life.'

"To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the

Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government, and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war."

The court then proceeded to say that these were illustrations of the breadth of the war power, and on the same page said:

"Thus it is said in the carefully prepared brief of respondent:

" 'To demand from an alien who desires to be naturalized an unqualified promise to bear arms in every war that may be declared, despite the fact that he may have conscientious religious scruples against doing so in some hypothetical future war, would mean that such an alien would come into our citizenry on an unequal footing with the native born, and that he would be forced as the price of citizenship, to forego a privilege enjoyed by others. That is the manifest result of the fixed principle of our Constitution zealously guarded by our law, that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so.' "

"This, if it means what it seems to say, is an astonishing statement. Of coure, there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provisions, express or implied; but because, and only because, it has accorded with the policy

of Congress thus to relieve him. The alien, when he becomes a naturalized citizen, acquires, with one exception, every right possessed under the Constitution, by those citizens who are native born (Luria v. U. S.); but he acquires no more. The privilege of the native born conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it withheld, the native-born conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or war in general."

In this case the court reviewed extensively the war powers, and shows that the Bill of Rights in time of public danger is regulated and limited and it may be regulated and limited even in peace times in any reasonable way.

Every right, constitutional or otherwise, is given as a guaranty, subject to the reasonable regulation by the legislative authority, to secure the safety, health and general welfare. In other words, such rights are not absolute rights. In every organized government the public rights are to receive due consideration and individual rights are granted and secured in view of the duty of the government to protect the whole people in all reasonable ways. As pointed out in this case the war powers of government come into play when war is declared or imminent, and has such power as

may be necessary when respectfully exercised to safeguard the country from invasion or destruction.

Chapter 178 of the Laws of 1942 (Appendix A) was not directed or intended to be applied to mere religious fields or religious opinions and only applied to any religious organization or any other organization when the members thereof brought themselves within the scope of the statute. In other words, the statute is not directed against religion, as such, but it is designed to prevent doing the prohibited things under the guise of religious belief or religious conviction.

In the case of Reynolds v. United States, 98 U. S. 145-148 25 L. Ed. 244, the court held that religious liberty or constitutional guaranty of the freedom of liberty and freedom of speech did not protect the person against the operation of police laws, or protect against acts that were deemed detrimental to the general welfare or public morals. The court in the course of its opinion in that case said:

> "The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religous freedom which has been guaranteed?
>
> "Before the adoption of the Constitution, attempts were made in some of the Colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they

could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the states, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that state having under consideration 'A bill establishing provisions for teachers of the Christian religion' postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested 'to signify their opinion respecting the adoption of such a bill at the next session of the Assembly.' This brought out a determined opposition. Among others, Mr. Madison prepared a 'Memorial and Remonstrance' which was widely circulated and signed, and in which he demonstrated 'that religion or the duty we owe the Creator,' was not within the cognizance of civil government. (Semple's Virginia Baptist, Appendix.) At the next session the proposed bill was not only defeated, but another, 'for establishing religious freedom' drafted by Mr. Jefferson, 1 Jeff. Works, 43; 2 Howison, Hist. of Va. was passed. In the preamble of this Act, 12 Hen. Stat., 84, religious freedom is defined; and after a recital 'That to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which destroys all religious liberty,' it is declared 'that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.' In these two sentences is found the true distinction between

what properly belongs to the Church and what to the State.

"In a little more than a year after the passage of this statute the convention met which prepared the Constitution of the United States. Of this convention Mr. Jefferson was not a member, he being then absent as Minister to France. As soon as he saw a draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion, 2 Jeff. Works, 355, but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. 1 Jeff. Works, 79. Five of the States, while adopting the Constitution, proposed amendments. Three, New Hampshire, New York and Virginia, included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards in reply to an address to him by a committee of the Danbury Baptist Association, 8 Jeff. Works 113, took occasion to say: 'Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only, and not opinion, I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make

no law respecting an establishment of religion or prohibiting the free exercise thereof.' Thus building a wall of separation between Church and State. Adhering to this expression of the Supreme will of the Nation in behalf of the rights of conscience, I shall see, with sincere satisfaction, the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.' Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus accrued. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order. . . . .

"Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pyre of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

"So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in

effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

It will be seen from this case that freedom of religion does not mean that a person can shield himself by mere religious belief from the consequences of the criminal statutes designed to promote public safety, health, etc. It will be clearly impossible for any government to exist and maintain laws for the common good of the people if any person who happened to have a contrary belief could defeat them on the ground of religious belief. There must be in every government somebody to decide on the meaning and limitations of constitutional provisions and restrictions; and in our government the courts have this power of decision and the judgment of the court as to the scope of the constitutional provision is binding upon the citizen, and citizens, aliens, and the departments of government must yield private opinion to the authority of the courts.

In the case at bar the defendants place their judgment against that of the law as declared by the court.

In the case of Davis vs. Beason, 133 U. S. 333-348 33 L. Ed. 637, the court had under consideration a prosecution by the Territory of Idaho for the offense of bigamy denounced by the Federal statute while Idaho was under territorial government, and the court declared that the punitive power of the government for acts recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation cannot be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance. In the course of the opinion by Mr. Justice Field, the court said:

"To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases.

* * *

"The first amendment to the Constitution in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. The oppressive measures adopted, and the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform in their religious beliefs and modes of worship to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons and enforce an outward conformity to a prescribed standard, led to the adoption of the Amendment in question. It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may

think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes as prompted by the passions of their members, and history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kind ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs, their supporters could be protected in their exercise of the Constitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government, for acts recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance."

In the case of Minersville School District v. Gobitis, 84 L. Ed. 1375, 310 U. S. 586, the court had under consideration the question of whether it was within the power of a state through its lawmaking powers ev-

erywhere vested in the state to compel children attending the public schools to salute the flag on condition of remaining in the school, the court said:

> "The requirement of participation by pupls in public schools in the ceremony of saluting the national flag does not, in the case of a pupil who refuses participation upon sincere religious grounds, infringe, without due process of law, the liberty guaranteed by the Fourteenth Amendment."
> "In determining the scope of the constitutional guaranty of religious freedom, every possible leeway should be given to the claims of religious faith."

In the court of the opinion, on page 1379, the court said:

> "Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom. Even if it were assumed that freedom of speech goes beyond the historic concept of full opportunity to utter and to disseminate views, however heretical or offensive to dominant opinion, and includes freedom from conveying what may be deemed and implied but rejected affirmation, the question remains whether school children, like the Gobitis children, must be excused from conduct required of all the other children in the promotion of national cohesion. We are dealing with an interest inferior to none in the heirarchy of legal values. National unity is the basis of national security. To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordi-

nating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills. Compare Schneider v. Irvington, 308 U. S. 147, ante., 84 L. Ed. 155, 60 S. Ct. 146."

"Unlike the instances we have cited, the case before us is not concerned with an exertion of legislative power for the promotion of some specific need or interest of secular society—the protection of the family, the promotion of health, the common defense, the raising of public revenues to defray the cost of government. But all these specific activities of government pre-suppose the existence of an organized political society. **The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. 'We live by symbols.' The flag is the symbol of our national unity, transcending all internal differences however large, within the framework of the Constitution. This court has had occasion to say that ' . . . the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense . . . it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression.' Halter v. Nebraska, 205 U. S. 34, 46, 51 L. Ed. 696, 761, 27 S. Ct. 419, 10 Ann. Cas. 525, affirming 74 Nebr. 757."** * * * (Emphasis supplied).

"The preciousness of the family relation, the

authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom pre-suppose the kind ordered society which is summarized by our flag. A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties. That is to say the process may be utilized so long as men's right to believe as they please, to win others to his way of belief, and their right to assemble in their chosen places of worship for the devotional ceremonies of their faith, are all fully respected."

This case seems to me to fully sustain the statute in the present case. In construing the statute and measuring the government power which is here challenged, the conditions existing in the state which brought forth the legislation, must be borne in mind.

Most of us are familiar with the history of the conditions that existed in this state following the Civil War when so much disturbance of domestic tranquility took place due to the fact that there were two races in the state; and to the fact that persons coming from other sections of the country undertook to use one part of the population to exploit and oppress the other part and the mischief that resulted therefrom. There are now two races of approximately equal numbers in this state which have since 1890 been dwelling in relative peace and harmony. But having two different races living in the same country and in constant contact with each other and each having more or less certain race prejudice and race pride, it was deemed wise to prohibit, during the period of

the war, any effort to stir up prejudice and antagonism that would likely result in violence and possible disloyalty to the welfare of the country if stirred up by influences which always, in time of war, seek to promote discord and distrust to the end that evil may divide the population. This is a possible menace and exists in spite of the best efforts of the wise men of both races to keep down friction and trouble. It is well known to most men in Mississippi that agents of foreign governments, and especially Germany and Russia, were trying to promote dissatisfaction with our form of government since the outbreak of war in Eurpe before we took any part in the European affairs and before war was declared on us. This propaganda and hostile efforts to divide our people and breed dissatisfaction with the form and principle of our government was known when our Legislature met in 1938 and 1940; and yet no statute was enacted by either session, because we thought we could rely on the peace-time methods of discussion and persuasion. But when war was declared upon us, our legislature recognized the need to prepare in every possible legal way to meet conditions that might and probably would meet us in our effort to preserve our democratic institutions which provide "Liberty and Justice for All," which our flag symbolizes. See, further on this point my brief, Cummings v. State, a companion case to this.

In reference to the contention of appellants that the statute is void because Congress has taken over the field of control as to the use of the flag, I desire to say that this position is unsound. The states have power to legislate upon the subject, as well as the National Government. If the United States fails to legislate, then, of course, the States may, but I submit that both governments may legislate on it. The same

act may be made an offense against each government. See United States v. Lanza, 260 U. S. 377, 67 L. Ed. 314, 43 St. Ct. 141; Herbert v. La., 272 U. S. 312, 71 L. Ed. 270, 47 S. Ct. 103; Note to 16 A. L. R. 1231; Note to 22 A. L. R. 1551; Note to 10 A. L. R. 1587; Winslett v. State, 22 Ala. App. 480, 117 So. 5; Gray v. United States (C.A.A. 8th) 14 Fed. (2nd) 366; State v. Hosmer, 144 Minn. 342; Wilson v. Jersey City, 109 Atl. 364; Mass. v. Nickerson, 128 N. E. 273; 10 A. L. R. 1568; Guerra v. Vt., 110 Atl. 224, 10 A. L. R. 1560, syllabus 5 and 6. In this record I cite, and quote from the case of Halter v. Nebraska, 205 U. S. 34, 51 L. Ed. 696, 27 S. Ct. 410, 10 Ann. Cas. 525, quoting from the United States Supreme Court:

"It may be well at the outset to say that Congress has established no regulation as to the use of the flag, except that in the act approved February 20th, 1905, authorizing the registration of trade-marks in commerce with foreign nations and among the states, it was provided that no mark shall be refused as a trade-mark on account of its nature 'unless such mark . . . consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any state or municipality, or of any foreign nation.' 33 Stat. at L. 724, Sec. 5, Chap. 592, U. S. Comp. Stat. Supp. 1905, p. 670.

"The importance of the questions of constitutional law thus raised will be recognized when it is remembered that more than half of the states of the Union have enacted statutes substantially similar, in their general scope, to the Nebraska statute. That fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the states have, in their legislation, vio-

lated the Constitution of the United States. Our attention is called to two cases in which the constitutionality of such an enactment has been denied, Ruhstrat v. People, 185 Ill. 133, 49 L. R. A. 181, 76 Am. St. Rep. 30, 57 N. E. 41; People ex rel McPike v. Van De Carr, 178 N. Y. 425, 66 L. R. A. 189, 102 Am. St. Rep. 516, 70 N. E. 965. In the Illinois case the statute was held to be unconstitutional as depriving a citizen of the United States of the right of exercising a privilege impliedly, if not expressly, granted by the Federal Constitution, as duly discriminating and partial in its character, and as infringing the personal liberty guaranteed by the state and Federal Constitutions. In the other cases, decided by the court of appeals of New York, the statute, in its application to articles manufactured and in existence when it went into operation, was held to be in violation of the Federal Constitution, as depriving the owner of property without due process of law, and as taking private property for public use without just compensation.

"In our consideration of the questions presented we must not overlook certain principles of constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, Federal or State, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own fundamental law, or by the supreme law of the land, a state possesses all legislative power consistent with a republican form of government; therefore each state, when not thus restrained, and so far as this court is concerned, may, by legislation, provide not only for the health, morale, and safety of its people, but for the com-

mon good, as involved in the well-being, peace, happiness and prosperity of the people.

"Guided by these principles, it would seem difficult to hold that the statute of Nebraska, in forbidding the use of the flag of the United States for purposes of mere advertisement, infringes any right protected by the Constitution of the United States, or that it relates to a subject exclusively committed to the national government. From the earliest periods in the history of the human race, banners, standards, and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not then remarkable that the American people, acting through the legislative branch of the government, early in their history, prescribed as symbolical of the existence and sovereignty of the nation. Indeed, it would have been extraordinary if the government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation but a deep affection. No American, nor any foreign-born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.

"It may be said that, as the flag is an emblem of national sovereignty, it was for Congress alone, by appropriate legislation, to prohibit its use for illegitmate purposes. We cannot yield to this view. If Congress has not chosen to legislate on this sub-

ject, and if an enactment by it would supersede state laws of like character, it does not follow that, in the absence of national legislation, the state is without power to act. There are matters which, by legislation, may be brought within the exclusive control of the general government, but over which, in the absence of national legislation, the state may exert some control in the interest of its own people. For instance, it is well established that, in the absence of legislation by Congress, a state may, by different methods, improve and protect by navigation of a waterway of the United States, wholly within the boundary of such states. So, a state may exert its power to strengthen the bonds of the Union, and therefore, to that end may encourage patriotism and love of country among its people. When by its legislation, the state encourages a feeling of patriotism towards the nation, it necessarily encourages a like feeling toward the state. One who loves the Union will love the state in which he resides, and love both of the common country and of the state will diminish in proportion as respect for the flag is weakened. Therefore, a state will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown toward it. By the statute in question the state has in substance declared that no one subject to its jurisdiction shall use the flag for purposes of trade and traffic, a purpose wholly foreign to that for which it was provided by the nation. Such a use tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of national power and national honor. And we cannot

hold that any privilege of American citizenship or that any right of personal liberty is violated by a state enactment forbidding the flag to be used as an advertisement on a bottle of beer. It is familiar law that even the privileges of citzenship and the rights inhering in personal liberty are subject, in their employment, to such reasonable restraints as may be required for the general good. Nor can we hold that anyone has a right of property which is violated by such an enactment as the one in question. If it be said that there is a right of property in the tangible thing upon which a representation of the flag has been placed, the answer is that such representative which, in itself, cannot belong, as property, to an individual, has been placed on such thing in violation of laws and subject to the power of government, to prohibit the use for purposes of advertisement."

See also the opinion of the Nebraska Supreme Court in case note in 7 L. R. A. (NS) at page 1079; also reported in 121 Ann. St. at P. 754. See also Commonwealth of Mass. v. Sherman Mfg. Co., 4 Ann. Cas. 268, 189 Mass. 76, and case note at page 270 Ann. Cas. See also the state's power to legislate, 24 New Fed. Digest 72, Key No. 5. Near v. Minnesota, 283 N. S. 697, 51 S. Ct. 625, 75 L. 1357. The Federal Flag Salute statute, Chapter 435, 56 Statutes 380, U. S. Ca., Title 36 Sec. 171-178 and the State's statute here involved are not antagonistic and both operate.

We are now in a war period, and the cases already cited show that what may be done in time of peace may often be prohibitive in time of war when there is necessity of such matters. See Nichols v. School Board, 7 N. E. (2nd) 577, 110 A. L. R. 377, and case note. See Appendices A, B, C, and D.

I submit that the war situation calls for the upholding of the act of the Legislature.

Respectfully submitted,

ATTORNEY GENERAL

ASSISTANT ATTORNEY GENERAL

CERTIFICATE

I, Geo. H. Ethridge, Assistant Attorney General, in and for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true copy of the above and foregoing brief to Honorable Hayden Covington, Attorney of Record for the Appellant, at his post office address at 117 Adams Street, Brooklyn, New York.

This the APR 1 1943 day of _____ 1943.

ASSISTANT ATTORNEY GENERAL

APPENDIX "A"

Chapter 178, Laws of 1942:

Section 1. That any person who individually, or as a member of any organization, association, or otherwise, shall intentionally preach, teach, or disseminate any teachings, creed, theory, or set of alleged principles, orally, or by means of a phonograph or other contrivance of any kind or nature, or by any means or method, or by the distribution of any sort of literature, or written or printed matter, designed and calculated to encourage violence, sabotage, or disloyalty to the government of the United States, or the state of Mississippi, or who by action or speech, advocates the cause of the enemies of the United States or who gives information as to the military operations, or plans of defense or military secrets of the nation or this state, by speech, letter, map or picture which would incite any sort of racial distrust, disorder, prejudices or hatred, or which reasonably tends to create an attitude of stubborn refusal to salute, honor or respect the flag, or government of the United States, or of the state of Mississippi, shall be guilty of a felony and punished by imprisonment in the state penitentiary until treaty of peace be declared by the United States but such imprisonment shall not exceed ten years.

* * *

Section 5. Except as to cases then pending in court this act shall expire after the duration of the present war.

APPENDIX "B"

Chapter 155, Laws of 1942:

Section 1. * * *, That all boards of trustees of tax supported free public schools and all other state supported schools of the state of Mississippi, are authorized and hereby directed to instruct and require teachers under their control to have all pupils repeat the oath of allegiance to the flag of the United States of America at least once a week during the school year. The oath of allegiance required is as follows:

> "I PLEDGE ALLEGIANCE TO THE FLAG OF THE UNITED STATES OF AMERICA, AND TO THE REPUBLIC FOR WHICH IT STANDS, ONE NATION, INDIVISIBLE, WITH LIBERTY AND JUSTICE FOR ALL."

Section 2. That the state superintendent of education and through him the county superintendents of education shall acquaint all boards of trustees of free public schools with the provisions of this act and see that same are complied with as one of the duties of said trustees.

Section 3. That this act will in no way conflict with or diminish the authority or duties of any board of trustees or school officials in regard to the teachings of citizenship, patriotism, Americanism, or respect for the flag as required by section 6630, section 6544 or other sections of the 1930 Mississippi code or supplements thereto. This act merely places an additional duty on the above mentioned authorities.

APPENDIX "C"

Chapter 59, Laws of 1935:

* * *

Section 1. * * * That section 6544 of the Mississippi Code of 1930 be and the same is hereby amended so as to read as follows:

"Section 6544. The flag of the United States shall be displayed at every school building in the state in close proximity to the school building by being hoisted on a pole not less than thirty feet high, during all times the weather will permit without damage to the flag, and the trustees of every school building shall provide for the flag and its display.

Section 2. That every school within the state shall arrange a course of study concerning the flag of the United States, which said course of study shall include a history of the flag and what it represents, and the proper respect therefor.

APPENDIX "D"

U.S.C.A. Anno. 1942 Supplement, Sections 176-177, 56 Statutes 379, Chapter 435, Sections 4 and 5:

Section 176. No disrespect should be shown to the flag of the United States of America; the flag should not be dipped to any person or thing. Regimental colors, state flags, and organization or institutional flags are to be dipped as a mark of honor.

(a) The flag should never be displayed with the Union down save as a signal of dire distress.

(b) The flag should never touch anything beneath it, such as the ground, the floor, water or merchandise.

(c) The flag should never be carried flat or horizontally, but always aloft and free.

(d) The flag should never be used as drapery of any sort whatsoever, never festooned, drawn back, nor up, in folds, but always allowed to fall free. Bunting of blue, white and red, always arranged with the blue above, the white in the middle, and the red below, should be used for covering a speaker's desk, draping the front of a platform, and for decoration in general.

(e) The flag should never be fastened, displayed, used or stored in such a manner as will permit it to be easily torn, soiled, or damaged in any way.

(f) The flag should never be used as a covering for a ceiling.

(g) The flag should never have placed upon it, nor on part of it, nor attached to it any mark, insignia, letter, word, figure, design, picture, or drawing of any nature.

(h) The flag should never be used as a receptacle for receiving, holding, carrying, or delivering anything.

(i) The flag should never be used for advertising purposes in any manner whatsoever. It should not be embroidered on such articles as cushions or handkerchiefs and the like, printed or otherwise impressed on paper napkins or boxes or anything that is designed for temporary use and discard; or used as any portion of a costume or athletic uniform. Advertising signs should not be fastened to a staff or halyard from which the flag is flown.

(j) The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning. June 22, 1942, c. 435, Stat. 379.

Section 177. During the ceremony of hoisting or lowering the flag or when the flag is passing in a parade or in a review, all persons present should face the flag, stand at attention, and salute. Those present in uniform should render the right-hand salute. When not in uniform, men should remove the headdress with the right hand holding it at the left shoulder, the hand being over the heart. Men without hats merely stand at attention. Women should salute by placing the right hand over the heart. The salute to the flag in the moving column should be rendered at the moment the flag passes. June 22, 1942, c. 435, Sec. 5, 56 Stat. 380.

APPENDIX "E"

From the Bill of Rights Review, Fall No. 1941, at page 152, entitled "OUR FLAG. ITS SIGNIFICANCE," reading as follows:

"Our Flag! The most beautiful in design and symbolism in all the world. As it floats out into space, caressed by the breezes that blow, it symbolizes a glorious delivery from the oppression and suffering back of the Colonies; back of the Declaration of Independence; and back of the Constitution which moulded into form our great Nation, known to all the world as the United States of America.
"It stands as the Emblem of Religious and Civil Liberties.

"To pledge allegiance to that flag and to the Republic for which it stands, in no manner whatsoever transcends one's religious liberty.

"Religious liberty is one of the most important, if not the very first motive and objective of all the suffering and deprivations endured in order to obtain that freedom.
"We reverence the Bible as the Word of God, but we do not worship it. It teaches us about God as our Creator and the Heavenly Father, who loves and cares for His own.

"We do not reverence the flag in the same sense that we reverence Deity. We salute, honor and respect our flag as the emblem of all that entered into the Birth of our Nation, and of the very foundation upon which our Religious and Civil Liberties rest. It stands for that which secured and protects our

Religious Liberty, and that in itself is a recognition that one's Religious Liberty is above all else.

"In countries where all liberty has been taken away from the people, they are made to appreciate what it means to have a flag which really stands for something; which insures the right to worship God unmolested. Let us ever remember, however, that our flag is in no sense whatsoever an image to be worshipped; nor is it a likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; and to salute that flag in a beautiful patriotic gesture is in no sense a bowing down to or worshipping it or that for which it stands.

"To respect our Flag and to salute it, as I confidently believe all true Americans are instinctively glad to do and to pledge allegiance to the Republic for which it stands, comes from a noble human nature and citizenship."